

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 28, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1456-CR

Cir. Ct. No. 2012CF8

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALLAN DEAN OWENS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Pepin County:
JAMES J. DUVALL, Judge. *Affirmed.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Allan Owens, pro se, appeals orders denying his postconviction motions. Owens argues the circuit court erred by denying his

request for a *Franks*¹ hearing to challenge the search warrant. Owens further contends the circuit court erroneously exercised its discretion by denying his motions for plea withdrawal and reconsideration. Owens also claims for the first time on appeal that his appellate counsel abandoned him. We reject these arguments and affirm the orders.

BACKGROUND

¶2 The State charged Owens with one count of repeated sexual assault of a child based upon at least three violations of first- or second-degree sexual assault, and thirteen counts of possession of a firearm by a felon. In exchange for his no-contest pleas to the sexual assault charge and one firearm possession charge, the State agreed to dismiss the remaining charges in this and another case and cap its sentence recommendation at seven years' initial confinement and ten years' extended supervision. Just over two months later, Owens filed a presentence motion to withdraw his pleas. After a hearing, the circuit court denied the motion for plea withdrawal.

¶3 The court sentenced Owens to concurrent sentences resulting in a fifteen-year term, consisting of ten years' initial confinement and five years' extended supervision. Owens filed a notice of intent to seek postconviction relief. His appointed attorney ultimately withdrew without filing an appeal because he determined there were no issues of arguable merit and Owens consented to closing the attorney's file.

¹ *Franks v. Delaware*, 438 U.S. 154 (1978).

¶4 Owens proceeded pro se and filed a motion for a *Franks* hearing with accompanying memoranda in support of the motion; an amended *Franks* motion; a memo labeled “New Evidence In my Original Motion to Withdraw my Plea”; and a motion to withdraw his no contest plea based on “new evidence.” The circuit court denied the motions without a hearing. Owens then moved for reconsideration. The motion was denied and this appeal follows.

DISCUSSION

¶5 For the first time on appeal, Owens contends his appellate counsel “abandoned him by withdrawing from the case and refusing/failing to file a merit brief arguing at least one nonfrivolous issue” after Owens identified “strong potential meritable issues” in the case. Any challenge to the effectiveness of appellate counsel should have been raised by petition for writ of habeas corpus pursuant to *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (Ct. App. 1992). Even on its merits, however, Owens’ claim fails, as he does not identify any appellate issue with merit.

¶6 To the extent Owens argues his waiver of the right to appellate counsel was not knowing or voluntary, a letter from appellate counsel to Owens belies this claim. A criminal defendant has knowingly and voluntarily waived his or her right to counsel on direct appeal if the defendant is aware of: (1) the *Flores*² rights (to an appeal, to the assistance of counsel for the appeal, and to opt for a no-merit report); (2) the dangers and disadvantages of proceeding pro se; and (3) the possibility that if appointed counsel is permitted to withdraw, successor

² *State ex rel. Flores v. State*, 183 Wis. 2d 587, 516 N.W.2d 362 (1994).

counsel may not be appointed to represent the defendant in the appeal. *See State v. Thornton*, 2002 WI App 294, ¶21, 259 Wis. 2d 157, 656 N.W.2d 45. In the letter to Owens, counsel recounts that during a September 2013 meeting, Owens was advised of his *Flores* options, the disadvantages of proceeding pro se, and the fact that successor counsel would not be appointed. The letter also memorialized Owens' consent to counsel closing the file.

¶7 Owens also argues the circuit court erred by denying his request for a *Franks* hearing to challenge the search warrant. However, Owens waived his right to challenge the search warrant by pleading no contest. *See State v. Riekkoff*, 112 Wis. 2d 119, 123, 332 N.W.2d 744 (1983) (valid guilty plea waives all nonjurisdictional defects and defenses, including alleged violations of constitutional rights prior to the plea). The sole exception to the waiver rule is contained in WIS. STAT. § 971.31(10), which preserves a defendant's right to appeal the denial of a suppression motion. Although Owens contends this exception applies, he is mistaken. Owens never challenged the search warrant and the court never denied a motion to suppress.

¶8 Owens therefore contends his trial counsel was ineffective by failing to challenge the search warrant prior to entry of Owens' plea. To succeed on an ineffective assistance of counsel claim, Owens must show both (1) that his counsel's representation was deficient and (2) that this deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Here, Owens alleged that the police officer's search warrant affidavit omitted portions of the victim's statement and included other portions the officer knew to be false. A *Franks* hearing is required if a defendant makes a substantial preliminary showing that the search warrant affidavit omitted undisputed facts critical to the determination of probable cause or otherwise included a false statement, made with reckless

disregard for the truth, that was necessary to finding probable cause for the warrant. *Franks*, 438 U.S. at 155-56; *see also State v. Mann*, 123 Wis. 2d 375, 385–89 (1985). Here, as the circuit court noted, Owens failed to show why the allegedly false or omitted information “is essential to a material determination.” Ultimately, Owens fails to establish how he was prejudiced by counsel’s failure to challenge the search warrant.

¶9 Next, Owens argues the circuit court erroneously exercised its discretion by denying his presentence plea withdrawal motion. A defendant seeking to withdraw a plea before sentencing bears the burden of showing by a preponderance of the evidence that there is a fair and just reason for withdrawal. *State v. Garcia*, 192 Wis. 2d 845, 862, 532 N.W.2d 111 (1995). Fair and just reasons for plea withdrawal include a genuine misunderstanding of the plea’s consequences, haste and confusion in entering the plea, and coercion by counsel. *State v. Shimek*, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999). To be “fair and just,” the reason must be more than a defendant’s change of mind and desire to have a trial. *See State v. Canedy*, 161 Wis. 2d 565, 583, 469 N.W.2d 163 (1991). The decision to grant or deny a presentence motion for plea withdrawal is committed to the circuit court’s discretion. *State v. Jenkins*, 2007 WI 96, ¶30, 303 Wis. 2d 157, 736 N.W.2d 24.

¶10 In his plea withdrawal motion, Owens insisted he was innocent, claiming the victim told a friend’s wife that she fabricated the sexual assault. Owens also asserted that police reports misrepresented the victim’s recorded interviews. At a hearing on Owens’ plea withdrawal motion, Eric Affolter testified the victim told Affolter’s wife that she fabricated the sexual assault

allegations against Owens and Affolter and Affolter's wife shared this information during a jail visit with Owens on July 11, 2012.³ Owens also testified that he received the police reports and a DVD recording of the victim's interview around November 2012.

¶11 Owens entered his no contest plea on March 1, 2013. Because Owens was aware of the proffered information months before the plea hearing, the court determined the proffered information was not new, nor had Owens alleged newly discovered evidence. Owens did not claim a genuine misunderstanding of the plea; misleading advice from counsel; or coercive action by the State.⁴ Rather, it appeared Owens had a change of heart and regretted his decision to plead no contest in lieu of trial. As noted above, a fair and just reason for plea withdrawal must be more than a defendant's change of mind and desire to have a trial. *See Canedy*, 161 Wis. 2d at 583. The circuit court, therefore, properly denied the presentence plea withdrawal motion.

¶12 Owens alternatively contends the circuit court erred by denying his postconviction motion for plea withdrawal. In a postconviction motion for plea withdrawal, the defendant carries the heavy burden of establishing, by clear and convincing evidence, that plea withdrawal is necessary to correct a manifest injustice. *See State v. Thomas*, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d

³ Affolter's wife died before the motion hearing.

⁴ To the extent Owens' appellate brief alleges he was given bad advice, the evidence was weak, and the victim might not have shown up had the matter gone to trial, we decline to consider arguments not presented to the circuit court. *See State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997).

836. The manifest injustice standard requires the defendant to show “a serious flaw in the fundamental integrity of the plea.” *Id.*

¶13 In his motion, Owens raised several claims of ineffective assistance of trial counsel. Although ineffective assistance of counsel can constitute a manifest injustice, *see State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996), Owens’ motion makes only conclusory allegations and fails to establish how he was prejudiced by any claimed deficiency of trial counsel. Conclusory arguments are insufficient to determine trial counsel was ineffective. *See State v. Allen*, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433 (requiring specificity in postconviction motions).

¶14 The motion also alleged several other grounds for plea withdrawal, including a challenge to the credibility of both the victim and her mother; emphasis on an absence of corroborating evidence; and an assertion that the decision to enter a no contest plea was done pursuant to a “swift change of heart.” Owens’ list of conclusory allegations, however, does not establish a manifest injustice warranting plea withdrawal.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

